Supreme Court, U.S.
FILED
JAN 28 2014
CLERK

Nos. 13-354, 13-356

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS ET AL., *Petitioners*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL., *Petitioners*
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF CHURCH OF THE LUKUMI BABALU AYE, INC., THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AVE MARIA UNIVERSITY, COLORADO CHRISTIAN UNIVERSITY, EAST TEXAS BAPTIST UNIVERSITY, CRESCENT FOODS, THE INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, AND THE QUEENS FEDERATION OF CHURCHES AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI CURIAE*[1]

Amici are diverse religious organizations with a common and profound interest in robust constitutional protections for the free exercise of religion. In our experience, many lower courts misapprehend and thus misapply this Court's free exercise jurisprudence, concluding that all manner of laws and regulations that should fail *Smith*'s requirements of general applicability and neutrality nevertheless get a near-automatic pass under rational basis review. Because we lack sufficient power to protect our interests in the political arena, the result is that the religious exercise of our people and faith communities is often abridged. Proper understanding and application of this Court's free exercise jurisprudence, which is addressed in this brief, is therefore essential to these *amici*. Individual statements of interest are contained in the Appendix.

SUMMARY OF THE ARGUMENT

This brief suggests a rubric or framework for applying this Court's established Free Exercise jurisprudence. *Smith* and *Lukumi* set a clear standard: a law will be subject to strict scrutiny unless it is both (1) "generally applicable," and (2)

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[1] No counsel for a party authored this brief in whole or in part. No party, party's counsel, or other person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties' written consents to the filing of this brief are on file with the Clerk or included with this brief.

neutral. *Smith* announced the rule and *Lukumi* applied it, noting that the ordinances there fell "well below" the standard. Unfortunately, however, many lower courts misapprehend and thus misapply these nuanced decisions. It is not enough that a law does not target religion on its face. The Free Exercise clause is not a watered-down equal protection clause for religion.

1. The framework we suggest synthesizes *Smith*, *Lukumi*, and other precedent into a comprehensive, easy-to-administer test. The framework is vital to address the Free Exercise claim directly before the Court in *Conestoga Wood Specialties Corp.* v. *Sebelius*, No. 13-354 (Sep. 19, 2013) ("*Conestoga*"), but also for the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), claims presented in both *Conestoga* and *Sebelius* v. *Hobby Lobby Stores, Inc.*, No. 13-356 (June 27, 2013) ("*Hobby Lobby*"). RFRA and Free Exercise claims pose common questions, and the Court should address these questions consistently.

There are seven independent ways that a regulation may violate *Smith's* generally applicable, religion-neutral standard. A regulation may not:

(1) provide categorical exemptions for secular conduct but not analogous religious conduct;
(2) give the government discretion to make individualized exemptions based on the reasons for the underlying conduct;

(3) be selectively enforced against religious conduct;
(4) be enacted "because of" hostility toward religion;
(5) be gerrymandered to apply almost exclusively to religious conduct;
(6) impose gratuitous restrictions on religious conduct; *or*
(7) apply differently to different types of religious conduct.

We demonstrate below that violating *any* of the seven categories will subject a religion-burdening regulation to strict scrutiny, which requires the regulation to "advance interests of the highest order" (*i.e.*, "compelling" governmental interests), and "be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993).

2. The HHS Mandate is not generally applicable, is not neutral, and fails strict scrutiny. Among other reasons, the Mandate already categorically exempts millions of Americans, undermining the government's goals at least as much as religious conduct and conveying a value judgment in favor of the secular. The Mandate also accomplishes a religious gerrymander by treating different types of religious conduct differently.

ARGUMENT

I. A BROAD RANGE OF CASES FALL BETWEEN THE EXTREMES OF *SMITH* AND *LUKUMI*, BUT TAKEN TOGETHER THEY PROVIDE A COMPREHENSIVE FREE EXERCISE FRAMEWORK.

For more than 20 years, two cases have defined the landscape of Free Exercise jurisprudence: *Employment Division* v. *Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). *Smith* held that a law burdening religious exercise is subject to strict scrutiny unless it is both "generally applicable" and "neutral." 494 U.S. 872, 880-81 (1990). *Smith* was an easy case for this test: it involved "an across-the-board criminal prohibition" with no exceptions. 494 U.S. at 884. *Lukumi* was at the opposite end of the factual spectrum. The ordinances at issue in *Lukumi* were so riddled with exceptions that they burdened a particular religious group "but almost no others." 508 U.S. at 536.[2]

In *Lukumi*, the Court explained that it "need not define with precision the standard used to evaluate whether a prohibition is of general application" because the law at issue there "f[e]ll well below the

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[2] See *Ward* v. *Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (holding that a law riddled with exceptions is "the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny").

minimum standard necessary to protect First Amendment rights." *Id.* at 543. This case presents the Court an opportunity to further explicate the neutrality necessary to protect First Amendment rights and reiterate that it meant what it said in *Smith*: only laws that are truly neutral and generally applicable escape strict scrutiny.

Recently, this Court unanimously rejected the government's assertion that churches have no right to be treated more favorably under the First Amendment than labor unions. *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S.Ct. 694, 706 (2012). Such a position was "untenable" and "remarkable," the Court said, in light of the "text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Id.*; see also *Thomas* v. *Review Board*, 450 U.S. 707, 713 (1981) (stating that the Free Exercise Clause "gives special protection to the exercise of religion"). Thus, *Hosanna-Tabor* reaffirms that the First Amendment requires more than mere equal treatment for religious exercise.

Still, many lower courts remain uncertain about when a regulation is truly neutral and generally applicable. Further guidance from this Court will be useful not only for deciding these pending cases, but to equip lower courts and litigants with much-needed coordinates to navigate the broad range of challenged laws and facts that fall somewhere between *Smith* and *Lukumi*.

We emphasize that explicating the Free Exercise framework in detail is vital here if the Court directly addresses the Free Exercise claim presented in *Conestoga*.[3] But explication is also important to resolving the RFRA claims presented in both *Conestoga* and *Hobby Lobby*. While Free Exercise and RFRA standards differ in certain respects, both address similar concepts: what constitutes religious exercise, who may engage in it, when a regulation burdens that exercise, and whether the regulation is generally applicable and neutral. Thus, what the Court says about these concepts in one context (a RFRA claim) will necessarily implicate the analysis in the other (a Free Exercise claim).[4] Prudence and consistency suggest the need for a broad-picture perspective of Free Exercise jurisprudence whenever deciding RFRA claims.

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[3] The Third Circuit directly considered Conestoga's Free Exercise claim, *Conestoga Wood Specialties Corp.* v. *Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 383-88 (3d Cir. 2013), and petitioners have appealed that portion of the decision.

[4] Indeed, in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-37 (2006), the Court's compelling interest RFRA analysis made numerous references to the concept of general applicability. *Id.* at 431 (indicating that the Court will look "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants"); *id.* at 435-36 (reasoning that "slippery-slope" concerns with regard to the interest in uniformity "could be invoked in response to any RFRA claim for an exception to a generally applicable law").

These *amici* set out a rubric for determining when a law is generally applicable and neutral based on this Court's jurisprudence and subsequent application of that precedent by lower courts. We then apply this rubric to the HHS Mandate at issue in these cases.

II. *SMITH* AND *LUKUMI* PROVIDE A RUBRIC FOR DETERMINING WHETHER A REGULATION IS GENERALLY APPLICABLE AND NEUTRAL.

A. *Smith* and *Lukumi* applied the same standard but dealt with facts on opposite ends of the spectrum.

Smith involved a criminal ban on possession of peyote. Two Native Americans lost their jobs and were denied unemployment benefit compensation because they violated that law as part of a religious ceremony. 494 U.S. at 874. The question before this Court was "whether that prohibition [on possession of Peyote] is permissible under the Free Exercise Clause." *Id.* at 876. The Court upheld the law as generally applicable and neutral because it was an "across-the-board," exception-less ban. *Id.* 884.

In *Lukumi*, a Santeria priest challenged four municipal ordinances that restricted the killing of animals. In a unanimous decision, the Court struck down the ordinances, holding that they were not "neutral" because they accomplished a "religious gerrymander"—that is, they were riddled with

exceptions to the extent that they burdened "Santeria adherents but almost no others." 508 U.S. at 535-38. Further, the ordinances were not "generally applicable" because they failed to prohibit nonreligious killing "that endanger[ed] [the government's] interests in a similar or greater degree" than Santeria sacrifice did. *Id.* at 543-44.

Although some view *Lukumi* as an exception to *Smith* that applies only when the government targets a minority religion, that is not the case. *Lukumi* and *Smith* apply the same standard: a law will be subject to strict scrutiny if it is *either* (1) not "generally applicable," or (2) not neutral—both of which can occur even when there is no explicit governmental targeting of religion on the face of the statute. *Smith* and *Lukumi* merely represent easy cases on opposite ends of a factual spectrum: a quintessential blanket criminal prohibition is clearly generally applicable *and* neutral, while a religious gerrymander that targets religious adherents is clearly *neither* generally applicable *nor* neutral.

While *Smith* was the first case to clearly articulate the "[g]enerally applicable, religion-neutral" standard within the context of the Free Exercise Clause, 494 U.S. at 866 n.3, this standard is not inconsistent with pre-*Smith* Free Exercise jurisprudence. *Smith* did not overturn a single case. Indeed, *Smith* actually reaffirmed earlier precedent applying strict scrutiny to laws that were not targeted against religion. To be sure, this Court said

in *Smith* that laws that target religion would "doubtless be unconstitutional," *id.* at 877, but that is a far cry from saying *only* such laws are unconstitutional.

For example, *Smith* reinforced *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981), cases where the Court had struck down an unemployment compensation statute that burdened employees who refused work that conflicted with their religious beliefs, even though the Court recognized that the law did not "single[] out for disqualification only those persons who are unavailable for work on religious grounds." *Sherbert*, 374 U.S. at 416. *Smith* explained that despite the lack of religious targeting, the laws at issue in *Sherbert* and *Thomas* were not neutral and generally applicable because "[t]he statutory conditions * * * provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work" and the "'good cause' standard created a mechanism for individualized exemptions." *Smith*, 494 U.S. at 884 (quoting *Bowen* v. *Roy*, 476 U.S. 693, 708 (1986) (plurality opinion)). The Court reasoned that its "decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse

to extend that system to cases of 'religious hardship' without compelling reason." *Id.* [5]

Then, in *Lukumi*, the Court expounded upon the "neutral" and "generally applicable" standard. The Court unanimously struck down four city ordinances that restricted the killing of animals only when the killing took place as a part of a ritual or ceremony, and was not for the primary purpose of consumption. See 508 U.S. at 536-37. The Court explained that the design of the laws was "an impermissible attempt to target [the Santeria] and their religious practices" because they burdened "Santeria adherents but almost no others." *Id.* at 536. Importantly, the Court identified *Lukumi* as an extreme case, emphasizing that since these ordinances fell "*well below* the minimum standard necessary to protect First Amendment rights," it "*need not define with precision the standard used to evaluate whether a prohibition is of general application.*" *Id.* at 543 (emphasis added). Thus, the Court indicated that there was room between *Smith* and *Lukumi* for a law to be considered not neutral and not generally applicable, even where it did not specifically target religion.

Properly read, *Smith* and *Lukumi* set out a rubric for deciding Free Exercise claims that is somewhat

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[5] The *Smith* opinion, and the *Sherbert* holding as reinterpreted in *Smith*, are both inconsistent with reading *Lukumi* as merely a unique exception to the general rule. *Smith* characterized the South Carolina law at issue in *Sherbert* as having "at least some" exceptions. *Smith*, 494 U.S. at 884.

obscured by their "easy" facts. We next explore the space between *Smith* and *Lukumi* in greater detail and set forth that Free Exercise rubric, which courts can use to evaluate cases that, like this one, fall somewhere in between.[6]

B. Seven principles define the *Smith-Lukumi* standard.

Smith, *Lukumi*, pre-*Smith* precedent, and lower court decisions identify seven independent ways that the government may depart from the "[g]enerally applicable, religion-neutral" standard. We propose that a regulation violates this standard and will trigger strict scrutiny if the regulation:

(1) provides categorical exemptions for secular conduct but not analogous religious conduct;
(2) gives the government discretion to make individualized exemptions based on the reasons for the underlying conduct;
(3) is selectively enforced against religious conduct;
(4) is enacted "because of" hostility toward religion;

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[6] Indeed, since *Smith* and *Lukumi* lower courts have applied strict scrutiny to laws that they concluded were either not neutral or not generally applicable, even though the facts were "a very far cry from *Lukumi*." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 35 (2000) (analyzing cases).

(5) is gerrymandered to apply almost exclusively to religious conduct;
(6) imposes gratuitous restrictions on religious conduct; *or*
(7) applies differently to different types of religious conduct.

As noted, this rubric encompasses *Smith*'s and *Lukumi*'s two broad themes: the first three categories go to general applicability, which focuses on "unequal treatment"; the second four go to neutrality, which focuses on the "object or purpose of [the] law." *Lukumi*, 508 U.S. at 533, 542.

As then-Judge Alito articulated,

> A law [fails the *neutrality* requirement] if it * * * target[s] religiously motivated conduct either on its face or as applied in practice. A law fails the *general applicability* requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.

Blackhawk v. *Pennsylvania*, 381 F.3d 202, 209 (3rd Cir. 2004) (emphasis added) (citations omitted).

Importantly, each of these categories is independently sufficient to trigger strict scrutiny on

its own.[7] Although many of the categories were arguably present in *Lukumi*, as noted earlier, the Court made clear that the regulations there fell "*well below* the minimum standard necessary to protect First Amendment rights." *Lukumi*, 508 U.S. at 533. The Court also acknowledged that a government regulation can fail to be generally applicable or neutral in "many ways." *Id.* at 543.

We discuss each category in turn and then apply the rubric to the present cases to show that heightened scrutiny applies to the HHS Mandate. Ultimately, however, our purpose is larger than just getting the right decision in the present cases. We urge the Court to confirm this framework so that lower courts will understand that *Smith* meant what it said—a law must be truly neutral and generally applicable to escape strict scrutiny—and that *Lukumi* did not set a baseline but was, rather, an extreme example of a law that fell "well below" *Smith*'s requirements.

C. Under *Smith* and *Lukumi*, a religion-burdening law is not generally applicable if it (1) categorically exempts analogous secular conduct, (2) provides for individualized

[7] These categories do, however, contain some overlapping concepts. As *Lukumi* recognized: "Neutrality and general applicability are interrelated, and * * * failure to satisfy one requirement is a likely indication that the other has not been satisfied." 508 U.S. at 531.

assessments, or (3) is selectively enforced.

1. First, a regulation is not generally applicable when it "creates a categorical exemption" for secular conduct that undermines the government's interest in enacting the regulation but does not exempt analogous religious conduct. "Categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. At a minimum, religious conduct must be treated as favorably as similar secular conduct. *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004); see also *Lukumi*, 508 U.S. at 542 ("The Free Exercise Clause protect[s] religious observers against unequal treatment." (internal quotation marks omitted)); *Smith*, 494 U.S. at 884 (a law is not generally applicable if "the reasons for the relevant conduct" determine whether the law has been violated).

For example, the ordinances in *Lukumi* prohibiting animal slaughter were ostensibly enacted to protect public health and prevent animal cruelty, but "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice d[id]." 508 U.S. at 543. Because they expressly exempted many types of animal killing—hunting, fishing, euthanasia of

excess animals, and the eradication of pests[8]—the ordinances were not generally applicable. *Id.* at 543-44. They represented "a prohibition that society [wa]s prepared to impose upon [the religious] but not upon itself," which is the "precise evil [that] the requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 545-46 (quoting *Fla. Star* v. *B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring)).

Even a single secular exemption triggers heightened scrutiny when it undermines the State's alleged interest in enacting the regulation. Indeed, numerous lower courts have held that categorical exemptions rendered a law not generally applicable when the exemptions were far less sweeping than *Lukumi*'s.[9]

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[8] The city argued that "it is 'self-evident' that killing animals for food is 'important'; the eradication of insects and pests is 'obviously justified'; and the euthanasia of excess animals 'makes sense.'" *Lukumi*, 508 U.S. at 544. The secular exemptions may be important to the statutory scheme, but the financial hardship they shield is not constitutionally protected. The free exercise of religion is.

[9] *Canyon Ferry Rd. Baptist Church of E. Helena, Inc.* v. *Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements exempted media organizations but not churches); *Blackhawk*, 381 F.3d at 211 (wildlife-permitting fee exempted zoos, circuses, and hardship but applied to Native American owning bear for religious purposes); *Midrash*, 366 F.3d at 1233 (retail-friendly zoning ordinance exempted lodges and private clubs, but not churches and synagogues); *Mitchell County* v. *Zimmerman*, 810 N.W.2d 1 (Iowa 2012) (prohibition on steel protuberances on wheels exempted school buses but applied to Mennonite tractors).

As just one example, in *Fraternal Order of Police* v. *City of Newark*,170 F.3d 359 (3d Cir. 1999), a Third Circuit decision written by then-Judge Alito, a police department adopted a policy prohibiting officers from growing beards in the interest of promoting "uniform appearance." 170 F.3d at 366. That policy had two exceptions: one for undercover officers and another for beards grown for medical reasons. *Id.* The Third Circuit held that the undercover officer exemption did not trigger strict scrutiny because it "d[id] not undermine the Department's interest in uniformity [of appearance]," but also held that the exemption for medical reasons did trigger strict scrutiny because it undermined the interest in uniformity just as much as a religious exemption would. *Id.* Thus, even though the law still applied to a wide array of secular motivations for a wearing a beard—fashion, personal preference, or convenience—the court concluded that the law was not generally applicable because of a single, categorical exemption that treated religious conduct unfavorably when compared to analogous secular conduct. *Id.*

These cases illustrate that the categorical exemptions doctrine is rooted in two concerns. First, selectively granting a secular but not a religious exemption represents a "value judgment" against religious conduct, even if that value judgment isn't

explicit or rooted in discriminatory animus.[10] *Newark*, 170 F.3d at 366; see also *Lukumi*, 508 U.S. at 537 (indicating that the numerous exemptions "devalue[] religious reasons for killing by judging them to be of lesser import than nonreligious reasons"). Second, *Smith* presumes that religious individuals can be protected through "the political process." *Smith*, 494 U.S. at 890. Although a small religious minority will be unable to defeat a regulation on its own, when that regulation is generally applicable more powerful interests that are burdened by it may oppose it, providing vicarious protection for the religious minority. If, however, the government can make selective exemptions for powerful political groups, the "vicarious political protection [for religious minorities] breaks down * * * leaving a law applicable only to small religions with unusual practices." Douglas Laycock, *The Supreme*

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[10] It does not matter why some secular conduct has been favored; absent compelling reasons, religiously motivated conduct must be treated as favorably as the favored secular conduct. *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (McConnell, J.) ("[T]he Free Exercise Clause has been applied numerous times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as saving money * * *."). Even good faith exemptions trigger strict scrutiny; exemptions that result in unequal treatment of religious and secular conduct make the law not generally applicable, no matter whether the inequality was "because of" religion, or targeted "against" religion. See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 204 (2005).

Court and Religious Liberty, 40 CATH. LAW 25, 36 (2001).

2. A second way that a regulation can fail general applicability is if it gives the government discretion to make "individualized," case-by-case exemptions based on "the reasons for the [underlying] conduct." *Smith*, 494 U.S. at 884; see *Blackhawk*, 381 F.3d at 211.

This is largely what *Sherbert* stands for after *Smith*. *Sherbert* struck down a state law that denied unemployment benefits to any person who refused a job "without good cause." 374 U.S. at 401. As the Court explained in *Smith*, this triggered strict scrutiny because "good cause" created a mechanism for "individualized exemptions" based on an "individualized governmental assessment of the reasons for the relevant conduct" and "consideration of the particular circumstances" of personal hardship. 494 U.S. at 884.

The Court applied the same principle in *Lukumi* where the city ordinances prohibiting "unnecessary" killing of animals, which created considerable discretion. 508 U.S. at 537. The Court held that "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

Lower courts have also applied the doctrine of individualized exemptions. For example, *Blackhawk* v. *Pennsylvania*, 381 F.3d 202 (Alito, J.), confronted an animal-keeping law with an exemption that permitted fee waivers for "hardship or extraordinary circumstance" so long as the conduct was "consistent with sound game or wildlife management," *id.* at 211. The Court held that the law was not generally applicable because such "open-ended" exemption language gave government officials considerable discretion in granting the exemption, to the possible detriment of Native Americans owning bears for religious purposes. *Id.* at 205, 209-10.

The rationale behind the individualized exemptions doctrine is simple. When the government applies an "across-the-board" prohibition, as in *Smith*, there is little risk that it is discriminating against religious conduct. 494 U.S. at 884. But when an open-ended law grants government officials discretion to exempt conduct on an individualized, case-by-case basis, this "provides an opportunity for the decision maker to decide that secular motivations are more important than religious motivations and thus to give disparate treatment to cases that are otherwise comparable." *Blackhawk*, 381 F.3d at 209 (citing *Smith*); see also *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply the

legislation and thus to escape the political retribution that might be visited upon them if large numbers were affected."). The risk that such discriminatory treatment might occur warrants application of heightened scrutiny. *Id.*

3. A third, independent way to show that a law is not generally applicable is to demonstrate that it has "been enforced in a discriminatory manner," such that religious and secular conduct are unequally treated in a way not reflected in the text of the regulation. *Blackhawk*, 381 F.3d at 209 (Alito, J.); see *Lukumi*, 508 U.S. at 534 (rejecting the contention that judicial "inquiry must end with the text of the law at issue").[11]

A leading example of selective enforcement is the Third Circuit's decision in *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). In *Tenafly*, an ordinance banned signs or advertisements from public utility poles, without any exemption in the text. *Id.* at 151. In practice, however, there was an unwritten policy of non-

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[11] "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373–74 (1886); see also *Wayte* v. *United States*, 470 U.S. 598, 608 (1985) (stating that a decision to prosecute a law may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification").

enforcement against house numbers, lost animal signs, directional signs, and even Christmas displays. *Id.* But the town did enforce the ordinance against Orthodox Jewish *lechis,* which are thin black strips of plastic marking the area within which Orthodox Jews can carry objects on the Sabbath. *Id.* at 151-53. The Third Circuit held that "selective, discriminatory application" of the ordinance "'devalue[d]' Orthodox Jewish reasons for posting items on utility poles by 'judging them to be of lesser import than nonreligious reasons.'" *Id.* at 168 (quoting *Lukumi*, 508 U.S. at 537-38).

In some cases of selective enforcement the statute may already have explicit exemptions, and then also not be enforced in additional scenarios. For example, in *Rader* v. *Johnston*, 924 F.Supp. 1540, 1546 (D. Neb. 1996), a school had a formal policy with specific categorical exemptions but then also "grant[ed] exceptions to the policy, at their discretion, in a broad range of circumstances not enumerated in the rule and not well defined or limited." *Id.*. at 1552. Such selective enforcement independently warrants strict scrutiny. See *id.* at 1552-53; *Alpha Delta Chi-Delta* v. *Reed*, 648 F.3d 790, 804-05 (9th Cir. 2011) (holding that strict scrutiny would apply if a policy was applied selectively against religious groups in practice).

The rationale for the doctrine of selective enforcement is also obvious: The government cannot be permitted to write incomplete rules that leave

accepted understandings unstated.[12] Otherwise it could easily treat religious and secular practices unequally without being subject to heightened scrutiny. See *Lukumi*, 508 U.S. at 534 ("The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause forbids * * * covert suppression of particular religious beliefs." (internal quotation marks and citations omitted)).

D. Under *Smith* and *Lukumi*, a religion-burdening law is not neutral if it (1) was adopted "because of" religious conduct, (2) accomplishes a "religious gerrymander," (3) imposes gratuitous restrictions on religious conduct; or (4) treats different religious groups differently.

In addition to general applicability, a regulation may also be subject to strict scrutiny if it is not neutral. A law fails neutrality if it "target[s] religiously motivated conduct either on its face or as applied in practice." *Blackhawk*, 381 F.3d at 209.

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[12] In a sense, the doctrine of selective enforcement is an extension of the individualized exemption doctrine. As the Tenth Circuit has indicated, a "'system of individualized exemptions' need not be [contained in] a written policy, but rather the plaintiff may show a pattern of ad hoc discretionary decisions amounting to a 'system.'" *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1298-99 (10th Cir. 2004). In that case, the plaintiff had argued that the government's willingness to grant an ad hoc exemption from a school policy to one student but not the other meant the rule was not generally applicable. *Id.*

1. One way to show that a regulation is not neutral is to demonstrate that it was "enacted 'because of', not merely 'in spite of,' [its] suppression of [religious conduct]." *Lukumi*, 506 U.S. at 540 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 265, 279 (1979)). A regulation enacted with an anti-religious motive is the epitome of a law that is not neutral.[13] *Id.* at 532 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

When determining motive, "[n]o inquiry into legislative purpose is necessary when [religious targeting] appears on the face of the statute." *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993). But if the face of the statute is neutral then the purpose of the

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[13] We reiterate that improper motive is only one way to show that a law is not neutral; it is *sufficient* to show lack of neutrality, but not necessary. See *Tenafly*, 309 F.3d at 168 n. 30 (noting that it is not "necessary to consider the subjective motivations" of those who enacted the regulation because discriminatory purpose can be "inferred * * * from the objective effects of the selective exemptions at issue without examining the responsible officials' motives"); *Shrum*, 449 F.3d at 1145 (McConnell, J.) ("Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus."). Indeed, although nine justices held the *Lukumi* ordinances unconstitutional, only two justices found or considered bad motive. 508 U.S. at 540-42 (Kennedy, J.).

regulation may be determined "from both direct and circumstantial evidence." *Lukumi*, 508 U.S. at 540.[14]

2. A second way to show that a law is not neutral is to demonstrate that it is crafted or "gerrymander[ed]" to apply to religious conduct. *Lukumi*, 508 U.S. at 532-40, 543. Rather than focusing on the legislative purpose of the regulation—*i.e.*, whether there is evidence of *discriminatory intent*—the focus of a religious gerrymander inquiry is the *discriminatory effect* of the regulation. See *Lukumi*, 508 U.S. at 535 (noting "the effect of a law in its real operation is strong evidence of its object").[15]

Borrowing from equal protection analysis, which is where the principle of "religious gerrymander"

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[14] This portion of Kennedy's opinion in *Lukumi* did not receive majority support. Only two of the justices relied on the historical background to determine the purpose for the regulations. *Id.* at 540-42. However, every circuit to address the issue has found it permissible to consider the historical background of a law in a Free Exercise challenge. See, e.g., *St. John's United Church of Christ* v. *City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007); *Wirzburger* v. *Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005).

[15] See also *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 307 n.21 (2000) ("Even if the plain language of the [regulation is] facially neutral * * * a State [cannot] hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." (internal quotation marks omitted)). This Court's Voting Rights Acts cases, which discuss gerrymanders within the context of equal protection analysis, indicate that discriminatory effects can be evidence of discriminatory intent. See, e.g., *Shaw*, 509 U.S. at 642-44; *Davis* v. *Bandemer*, 478 U.S. 109, 127 (1986).

derived, see *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 696 (1970), the question becomes whether the facially neutral regulation is "unexplainable on grounds other than [targeting religion]" because the effect is so "extremely irregular" or "bizarre." *Shaw*, 509 U.S. at 642-44 (internal quotation marks omitted).[16] In undertaking this inquiry, the effect of the regulation should be assessed to determine whether it is over or underinclusive relative to its stated purpose.

For example, in *Lukumi* the Court found that the effect of the ordinances was underinclusive: while generally prohibiting "unnecessarily * * * kill[ing] any animal," in practice, "the interpretation given to the [regulation] by [the government]" deemed killings for non-religious reasons to be necessary, such that they "f[e]ll outside the prohibition." 508 U.S. at 537. Moreover, they generally "fail[ed] to prohibit nonreligious conduct that endanger[ed] the[purposes of the ordinances] in a similar or greater degree than Santeria sacrifice d[id]." *Id.* at 544. In addition, the ordinances were overinclusive in that they "prohibit[ed] Santeria sacrifice even when it

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[16] See *Hunt* v. *Cromartie*, 526 U.S. 541, 555 (1999) (Stevens, J., concurring in the judgment) ("[B]izarre configuration is the traditional hallmark of a * * * gerrymander."); see also *Am. Family Ass'n, Inc.* v. *F.C.C.*, 365 F.3d 1156, 1170 (D.C. Cir. 2004) ("The unconstitutional [religious] gerrymander occurs when the bounds of legislation, like those of a gerrymandered political district, are artfully drawn to exclude the disfavored category–in this case, religious institutions.").

d[id] not threaten the city's interest in the public health," thus "proscrib[ing] more religious conduct than [wa]s necessary to achieve their stated ends." *Id.* at 538-39. The sum effect was that "the burden of the ordinance[s], in practical terms, f[ell] on Santeria adherents but *almost* no others," a clear discriminatory effect. 508 U.S. at 536 (emphasis added).

Other courts have similarly found religious gerrymandering or targeting when the effect of the regulation was such that it was unexplainable on grounds other than a motive to target religion, because it was overinclusive and underinclusive.[17]

3. A third related way to show that a regulation is not neutral is if it imposes "gratuitous restrictions" on religious conduct. *McGowan* v. *Maryland*, 366 U.S. 420, 520 (1961). Although an extension of the concept of overinclusiveness, this point warrants independent consideration.

In *Lukumi*, for example, the Court found "significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to

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[17] See, *e.g.*, *Midrash*, 366 F.3d at 1233-34 (holding that a regulation limiting a business district to venues providing for shopping and commercial services "improperly targeted religious assemblies" because it was "overinclusive" since "synagogues contribute to retail and commercial activity," and was also "underinclusive" since it exempted private clubs that were not "carried on as a business").

achieve their stated ends." *Lukumi*, 508 U.S. at 538. The Court explained that the government's interests could have been addressed through narrower restrictions rather than a "flat prohibition" that unnecessarily criminalized religious sacrifice "even when it d[id] not threaten the city's interest in the public health." *Id.* at 538-39.

Failure to use narrower means fatally undermines the government's claims of neutrality. When such "gratuitous restrictions" are imposed on religious conduct it is "reasonable to infer . . . [that the law] seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Id.* at 538; see also *Midrash*, 366 F.3d at 1233-34.

4. Finally, a law is not neutral if it applies differently to different types of religious conduct, such that it selectively benefits or burdens certain religions. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 536.

Although exempting (and thereby benefitting) the religious conduct of some, but not others, hearkens to the principle of unequal treatment that is encompassed within the generally applicable requirement,[18] differential treatment of religious

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[18] *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-37 (2006) (requiring exemption under RFRA

conduct is also relevant to neutrality.[19] That is because when exemptions are only granted to some religions, it is "evidence that the legitimate secular purposes underlying the [regulation] have been abandoned" since the regulation "favors [some] religions over [others]." *Booth* v. *Maryland*, 327 F.3d 377, 381 (4th Cir. 2003). Presaging *Smith*, in *Bowen* v. *Roy*, 476 U.S. 693, this Court indicated that while governmental action is entitled to "substantial deference" when the government chooses to "treat all * * * alike" because it cannot be accused of "favoring" certain conduct, if a law selectively exempts some religious conduct, "its refusal to extend an exemption to an[other] instance of religious hardship suggests a discriminatory intent." *Id.* at 708.

For example, in *Lukumi*, the ordinances exempted kosher slaughter (thereby benefitting Jewish conduct), while almost exclusively burdening Santeria sacrifice. *Id.* Although the Court noted that this "differential treatment of two religions," could constitute "an independent constitutional violation," *id.*, the Court stated that it was declining to decide that issue because it "suffice[d] to recite [differential

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for one religion where exemption had already been granted for another and the Act contemplated exemptions).

[19] In any event, it is of no consequence whether this principle is classified under neutrality or general applicability because a failure to meet either requirement triggers strict scrutiny. And as *Lukumi* recognized: "Neutrality and general applicability are interrelated, and * * * failure to satisfy one requirement is a likely indication that the other has not been satisfied." 508 U.S. at 531.

treatment] as support for [its] conclusion" that the city was targeting the Santeria religion.

Similarly, in *Booth* v. *Maryland*, 327 F.3d 377, a State correctional officer challenged the State's dress code and grooming policy that prohibited him from wearing Rastafarian dreadlocks. He presented evidence that despite the policy the State allowed a Jewish employee to wear peyos (long sideburns) and a Sikh employee to wear a turban and long beard, and argued that the "failure to consistently enforce its policy demonstrates that the [State's] stated legitimate reasons are not their real reasons for the policy, but are only pretext for their discrimination against him." *Id.* at 380-81. The Fourth Circuit held that the officer had "presented at least some evidence" that "the legitimate secular purposes underlying the policy ha[d] been abandoned," such that it violated his right to Free Exercise. *Id.*

Other Supreme Court and circuit cases have similarly struck down laws that exempted certain religions, but not others, on the basis of neutrality principles.[20] Indeed, concerns about differential

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[20] See, *e.g.*, *Fowler* v. *Rhode Island*, 345 U.S. 67, 69 (1953) (holding that a city that enforced an ordinance banning meetings in park against Jehovah's Witnesses but permitted Catholics and Protestants to hold services violated Free Exercise because its conduct "amount[ed] to preferring some religious groups over [the Jehovah's Witnesses]"); see also *Tenafly*, 309 F.3d at 151-52, 167 (holding that the law was not neutral where the government "granted exemptions from the ordinance's unyielding language for various secular and

treatment of religion within a regulation are closely related to Establishment Clause claims, which focus on neutrality.[21]

Whether related to an Establishment Clause or Free Exercise claim or both,[22] neutrality requires that "religious adherents and institutions [are]

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religious" purposes, including the use of poles for Christmas displays, but "never Orthodox Jewish[] purposes").

[21] As the Court stated in *McCreary Cnty., Ky.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005), "the Framers intended the Establishment Clause to require governmental neutrality in matters of religion," including the well-known principle that "the government may not favor one religion over another," *id.* at 875, 878. For example, in *Larson* v. *Valente*, 456 U.S. 228 (1982), the Court struck down registration and reporting requirements that benefitted "well-established churches that ha[d] achieved strong but not total financial support from their members," but disadvantaged "churches which are new and lacking in a constituency," *id.* at 246 & n.23 (internal quotation marks omitted). The Court explained that these "explicit and deliberate distinctions between religious organizations" showed "favoritism," violated the principle of "denominational neutrality," and ran contrary to "[t]he clearest command of the Establishment Clause * * * that one religious denomination cannot be officially preferred over another." *Id.* at 244.

[22] Although not before the Court in this appeal, when differential treatment of religion is involved there may also be an Establishment Clause claim. Where there is both a Free Exercise Claim and an Establishment Clause Claim this falls under *Smith*'s hybrid rights exception, which holds that a generally applicable and neutral law is still subject to strict scrutiny when the claim involves "the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881; see *E.E.O.C.* v. *Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that the EEOC's violation of the Establishment Clause triggered the hybrid rights exception in *Smith*).

neither * * * denied nor granted government benefits on the basis of religion." *E. Bay Asian Local Dev. Corp.* v. *State of California*, 13 P.3d 1122, 1158 (Cal. 2000).

E. The presence of any factor showing lack of general application or neutrality subjects the regulation to strict scrutiny.

The presence of any of these seven factors for assessing general applicability and neutrality triggers strict scrutiny. Under strict scrutiny analysis, a law restrictive of religious practice must (1) "advance interests of the highest order" (*i.e.*, "compelling" governmental interests), and (2) "be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546.

This test "leaves few survivors," *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 455 (2002), because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Lukumi*, 508 U.S. at 546. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406. Moreover, the regulation must further that compelling interest through the "least restrictive means" possible. *Thomas*, 450 U.S. at 718.

This is the same analysis required by RFRA for a regulation that substantially burdens religious exercise, and is fully briefed by the parties.[23]

III. THE HHS MANDATE IS NOT GENERALLY APPLICABLE, IS NOT NEUTRAL, AND FAILS STRICT SCRUTINY.

The federal regulation at issue in this case, the HHS Mandate, violates the Free Exercise Clause because it is neither generally applicable nor neutral under *Smith* and *Lukumi*.

1. A law that burdens religious exercise is not generally applicable if it contains a secular exemption that undermines the government's alleged interest as much as a religious exemption would. *Newark*, 170 F.3d at 366. The Mandate is riddled with exemptions: it has two large secular exemptions that extend to tens of millions of Americans, as well as additional exemptions for certain types of religious conduct that do not apply to the Greens or the Hahns.

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[23] RFRA's central provision directs that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability * * * [unless] it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b) (punctuation modified).

Among the secular exemptions are the "grandfather" exemption and the "small business" exemption. "Grandfathered" plans are indefinitely excused from complying with the Mandate, so long as they do not make certain changes to their plans after the ACA's effective date. 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In addition, small businesses with fewer than 50 employees are exempted from offering health insurance at all, also freeing them from the Mandate. 6 U.S.C. § 4980H(c)(2). These two exemptions alone apply to the plans of tens of millions of employees.[24]

Moreover, both the grandfather and small-business exemptions "endanger[the government's] interests in a similar or greater degree" as the Greens' and the Hahns' religiously motivated conduct. *Lukumi*, 508 U.S. at 543. The Mandate's alleged purpose is to provide equal access to preventative healthcare for women. 78 Fed. Reg. 39870-01, 39,872, 39,887 (July 2, 2013). Exempting any plan, no matter the reason, undermines this purpose because whenever a plan is exempted the recipient no longer receives preventative healthcare, thus inhibiting equal treatment. Yet, small employers are exempted, presumably because of the financial hardship the law would impose; but

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[24] See *Hobby Lobby*, 723 F.3d at 1124; WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business* at 2, http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.

religious hardship is not accounted sufficient enough to warrant an exemption.

This is exactly the kind of "value judgment in favor of secular motivations, but not [certain] religious motivations" that fails general applicability. *Newark*, 170 F.3d at 366. When exemptions are granted, "the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884). Importantly, it does not matter why some secular exemption has been granted; absent compelling reasons, religiously-motivated conduct must be treated as favorably as the favored secular conduct. As in *Sherbert*, the government cannot decide that there is "good cause" to exempt secular conduct, but that a religious excuse is not good enough.[25]

2. In addition to these two secular categorical exemptions, the Mandate violates neutrality because it applies differently to different types of religious

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[25] While it is true—as *Smith* and *Lukumi* hold—that religiously neutral laws of general applicability are reviewed more deferentially, the reason for that deference is a political check that provides strong hedges against both invidious *and* gratuitous abridgments of religious freedom. But that check *only* works where a law is truly neutral and generally applicable. *Smith* and *Lukumi*—both on their own terms and in light of prior free exercise decisions that remain good law—demonstrate that true religious neutrality and general applicability are often difficult to achieve, especially where regulators flexibly accommodate diverse secular interests, such as the financial concerns of small businesses.

conduct—selectively exempting (and thereby benefitting) certain religious objectors, while burdening others. "Religious employers," for example, are wholly exempted from the mandate. See 45 C.F.R. § 147.131(a). On the other hand, objecting non-profits, which were temporarily granted a safe harbor, 78 Fed. Reg. at 39,889,[26] may only be eligible for an "accommodation" that routes objectionable coverage through their insurer or plan administrator so that the nonprofit is not required to directly contract, arrange, or pay for such coverage, 78 Fed. Reg. at 39,874-79. Finally, for-profit religious objectors, like Hobby Lobby and Conestoga receive no exemption or accommodation at all. This violates the "minimum requirement of neutrality," which is that a regulation must not "discriminate on its face." *Lukumi*, 508 U.S. at 533.

Moreover, exempting only "religious employers" that are non-profit churches or their integrated auxiliaries, see 45 C.F.R. § 147.131(a),[27] may favor

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[26] This safe harbor that the government extended to nonprofits, first until August 2013 and then into January 2014, see 78 Fed. Reg. at 39,889, represents a measure of selective enforcement by the government, however temporary. *Tenafly*, 309 F.3d at 168.

[27] HHS regulations currently define "religious employer" as an organization that is a nonprofit organization as described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. See 45 C.F.R. § 147.131(a).

well-established, hierarchical churches that have the structures, funding, and adherents necessary to set up this type of religious employment within the church organization. Such a definition of religious employment discriminates among religious organizations based on their structure and belief. Such matters are outside the authority of the government. See *Hosanna-Tabor*, 132 S.Ct. at 704 (the First Amendment gives churches "'power to decide for themselves, free from state interference matters of church government as well as those of faith and doctrine'" (quoting *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). Favoritism defeats the requirement of general applicability *and* neutrality.

In sum, selectively exempting some religious conduct while "refus[ing] to extend an exemption to an[other] instance of religious hardship suggests a discriminatory intent." *Bowen*, 476 U.S. at 708.

3. Further, the Mandate is not neutral because it accomplishes a "religious gerrymander." As result of the extensive exemptions granted to small businesses, grandfathered plans, certain religious employers, and non-profits, up to 100 million people or more[28] have plans that are exempt from the Mandate in one fashion or another, making the mandate "substantial[ly]" underinclusive. *Lukumi*, 508 U.S. at 543. The Mandate is also overinclusive to

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[28] See *Hobby Lobby*, 723 F.3d at 1124.

the extent that it requires religious for-profit employers to pay for plans that include preventative coverage for women who have no intention of using it because this would be against *their* religion.[29] If the services go unused, requiring employers to pay for these plans does not further the purpose of improving women's health.

While Hobby Lobby, Conestoga, and other similarly situated employers with religious objections are far from being the only (or even the "almost" only) employers subject to the ban, it is still telling that such a high amount of secular and religious conduct is exempted from the Mandate. Since regulators obviously were not concerned that exempting thousands of other employers (*i.e.*, grandfathered employers, small businesses, and religious employers) would defeat the purpose of the Mandate, then it is not clear why for-profit religious objectors could not be similarly exempted. The government has offered no explanation for why this particular conduct is any more threatening to the purposes of the law. This smacks of a religious gerrymander targeted toward for-profit conscientious objectors.

Exempting for-profit religious employers would not undermine the purpose of the Mandate any more

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[29] Indeed, religious-conscious employers like Hobby Lobby and Conestoga seem particularly likely to have employees that share their values and would not use preventative services. 78 Fed. Reg. at 39,874.

than the exemptions the government has already granted. Indeed, businesses with fewer than 50 employees do not have to provide insurance to their employees at all. Hobby Lobby does not object to providing birth control, but only to certain types of birth control.

4. Finally, relatedly, the Mandate imposes a gratuitous restriction on for-profit religious employers like Hobby Lobby and Conestoga by forcing them to pay for religiously-objectionable abortifacients. Thus, the mandate "proscribe[s] more religious conduct than it necessary to achieve [its] stated ends." *Lukumi*, 508 U.S. at 538.

5. If only one of these categories from *Smith* and *Lukumi* is present, a case warrants strict scrutiny.[30] Here, the Mandate falls into several categories that defeat any claim that it is neutral and generally applicable. Like *Lukumi*, it falls "well below" the "across-the-board" criminal prohibition at issue in *Smith*. Thus, it should be subject to strict scrutiny.

We refer to the parties' briefs for their further application of this Court's strict scrutiny test. As Conestoga has already said, "[t]he interests of 'equality' and 'health' [that the Mandate] ostensibly furthers are generic, inconsistently pursued, and

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[30] We acknowledge that some of the factors apply better in this case than others, but that is of no consequence because any one of the problems listed in the rubric triggers heightened scrutiny. Indeed, the massive categorical exemptions alone are sufficient to require strict scrutiny.

unsupported by evidence showing the Mandate [promotes] them to a compelling degree. And the government could use[] less restrictive means to achieve those ends because it already pursues such means extensively." *Id.*

CONCLUSION

For the foregoing reasons, the Court should uphold the judgment in *Hobby Lobby* and reverse the judgment in *Conestoga*.

Respectfully submitted,

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January 28, 2014

APPENDIX

APPENDIX

DETAILED STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **Church of the Lukumi Babalu Aye, Inc.**, is a religious organization that has been subjected to discrimination in the United States and has sought judicial relief based on the Free Exercise Clause. *Amicus* has successfully pressed before the Supreme Court its constitutional rights to engage in religious practice. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Because *Amicus* is a religious minority in the United States who often relies on courts to protect its rights, it submits this brief to emphasize and explain the importance of considering all available evidence when evaluating whether a facially neutral law is truly neutral and generally applicable.

The **International Society for Krishna Consciousness, Inc.** ("ISKCON") is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. As a religious organization, ISKCON has been subjected to discrimination in the United States and has sought judicial relief based on the Free Exercise Clause. *Amicus* has successfully pressed before the Supreme Court its constitutional rights to engage in religious practice. See *Lee* v. *Int'l*

Soc. for Krishna Consciousness, Inc., 505 U.S. 830 (1992) (per curiam). Because *Amicus* is a religious minority in the United States who often relies on courts to protect its rights, it submits this brief to emphasize and explain the importance of considering all available evidence when evaluating whether a facially neutral law is truly neutral and generally applicable.

Ave Maria University ("AMU") was founded in 2003 in fidelity to Christ and His Church in response to the call of Vatican II for greater lay witness in contemporary society, and exists to further teaching, research, and learning at the undergraduate and graduate levels in the abiding tradition of Catholic thought in both national and international settings. AMU is vitally interested in the protection of the principle and practice of religious liberty as manifest in the present action.

Colorado Christian University ("CCU") is an interdenominational evangelical university located in Lakewood, Colorado. The essence of CCU is its distinctive integration of academic achievement, character development, and spiritual formation which prepares CCU graduates to honor God and impact the world with their lives. CCU serves more than 5000 students on campus, online and at five regional centers in Colorado.

East Texas Baptist University (ETBU) is a Christian liberal arts university located in Marshall, Texas. Established in 1912, ETBU is committed to offering a complete education that develops students spiritually, intellectually, and professionally. The University has more than 1,290 graduate and undergraduate students. Faith is central to the educational mission of ETBU. ETBU describes itself as providing "academic excellence while integrating faith with learning," and commits, in its mission, to "Christian stewardship and to providing and maintaining and environment conducive to learning, leadership development, and academic excellence." Consistent with its mission, ETBU works to manifest its Christian faith in all aspects of its operations.

Crescent Foods is a Halal poultry manufacturer, which has supplied Halal chicken to the American market for almost 19 years. Its business model incorporates its religious beliefs and is exhibited throughout the company. A Halal product must be slaughtered by Muslims in order to be Halal, which means "permitted." The product must be handled in a facility where no pork or alcohol may ever be brought in and is monitored by the USDA. *Amicus* never funds the expansion of the business with interest bearing loans, as it is against Islamic and Halal beliefs. It provides jobs for over 80 families. *Amicus* is very keen on the protection of religious values through the practice of religious liberty, as manifest in the present action.

The **Institutional Religious Freedom Alliance** ("IRFA"), founded in 2008, works to protect the religious freedom of faith-based service organizations, acting through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of such faith-based services.

The **Queens Federation of Churches** (the "Federation") was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Federation and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty as manifest in the present action.